Supreme Court, U.S.
FILED
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No. 99-

IN THE
Supreme Court of the United States

DANIS TUCKER,

Petitioner,

v.

FIRST COMMERCIAL BANK NA, MONTERREY, INC., and MICHAEL DAVID BOUDLOCHE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 3, 2000

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QUESTIONS PRESENTED

Did the Court of Appeals give appropriate deference to the expressed intent of Congress to allow debtors in bankruptcy the right to claim state exemption statutes under 11 U.S.C. § 522(b) in denying Petitioner the relief sought in this case?

Was the Court of Appeals correct in holding that this case was merely an appeal of an order of the bankruptcy court authorizing a sale of Petitioner's claimed homestead under 11 U.S.C. § 363(m) or did they err in holding that they had no discretion in this matter?

If the Court of Appeals should ultimately decide that Petitioner's property is his rural homestead under Texas law and is exempt from forced sale under Article XVI, § 50 of the Texas constitution and 11 U.S.C. § 522(c), should Petitioner be denied a remedy?

If this Court denies the stay requested and Petitioner prevails on his Homestead Appeal, is he being denied due process of law under the due process clause of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding is not required, since the names of all parties appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Danis Tucker respectfully petitions for a writ of certiorari to review the holding of the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel decision of January 4th, 2000 of the Fifth Circuit (Pet. App., 1a-5a) is unpublished, at the discretion of the Fifth Circuit pursuant to 5TH CIR. R. 47.5.4. No petition for rehearing was filed. The final order of the United States District Court for the Southern District of Texas, Corpus Christi Division (Pet. App, 6a) was entered on January 12, 1999 (Pet.App, 6a). The order of the Bankruptcy Judge of April 1, 1998 (Pet. App., 12a-14a) disposing of Petitioner's rural homestead protected by the Texas Constitution (Pet. App. 24a) pursuant to 11 U.S.C. § 363 (Pet. App., 10a).

JURISDICTION

The District Court has jurisdiction of the appeal from Bankruptcy Court under 28 U.S.C. § 1334 and 28 U.S.C. §158(a)(1) pertaining to appeals from a final judgment and a final order from the Bankruptcy Court. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 158(d).The Court of Appeal's decision was January 4, 2000. This Court has jurisdiction to issue this writ under 28 U.S.C. §1254(1). A motion for rehearing in the Court of Appeals, which was not filed, is not a jurisdictional condition for the issuance of a writ by this Court under Rule 13.3 of the Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This a case which involves the juxtaposition of *Art. XVI, §51* of the Texas Constitution and 11 U.S.C. §363(m).

Article XVI, § 51, in relevant part reads as follows:

". . . § 50. Homestead; protection from forced sale; mortgages, trust deeds and liens

Sec. 50. (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:

(1) the purchase money thereof, or a part of such purchase money;

(2) the taxes due thereon;

(3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;

(4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;

(5) work and material used in constructing new improvements thereon, if contracted for in writing,

or work and material used to repair or renovate existing improvements thereon[1] . . ."

11 U.S.C. §363(m) reads as follows:

". . .The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.."

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS and DISPOSITION in the Court Below.

This is a case which arises out of a bankruptcy case. Petitioner claimed his rural homestead exempt under 11 U.S.C. § 522(b) (Pet. App. A2), under which he opted for the Texas exemption law. The bankruptcy court denied Petitioner's homestead claim, and that claim is currently on appeal[2] in the Fifth Circuit.

The sole issue before this court is whether the lower courts and the Court of Appeals were correct in holding that 11 U.S.C. § 363(m) rendered them powerless to afford Petitioner a remedy even if his case would ultimately be decided on the merits in Petitioner's favor (Pet.App. A3).

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[1] The remainder of this provision is quite lengthy and is not relevant to this writ. It is not included herein.

[2] The "Homestead Appeal" (Pet. App, 2a) is scheduled for oral argument on May 2, 2000 in Cause No. 97-41385.

Certainly this Petition would be rendered moot if Petitioner should ultimately lose his Homestead Appeal on the merits. The proceedings to which this Petition pertains is not an appeal from an authorization to sell property of the bankruptcy estate under 11 U.S.C. § 363 (b) or (c), as the lower courts held. The failure of the lower courts to recognize this distinction results in this writ.

The instant case represents a diligent effort by Petitioner to preserve his rights in the *res* of his homestead guaranteed to him by Article XVI § 50 and § 51 of the Texas Constitution, which authorization was specifically authorized by Congress by enacting 11 U.S.C. § 522(b). This sale by the bankruptcy court has been consistently attacked by Petitioner because of the erroneous rulings of the lower courts' denial of his homestead rights. Petitioner's consistent concerns in the instant case are that if he prevails on his Homestead Appeal, then he still would have no remedy, even though it would be held that his Texas rural homestead is not part of the bankruptcy estate.

Petitioner sought to consolidate this case with the Homestead Appeal (Pet. App., 19a), but this was denied by the Court of Appeals (Pet. App. A5) Thus, this Court is the only one which can afford Petitioner any relief pending the final determination of the merits of his Homestead Appeal.

B. Statement of Facts

The order of sale which initiated the instant case was entered by the bankruptcy court on April 1, 1998 (Pet. App. 12a-14a). Prior to the instant case, while *pro se*, Petitioner made efforts to contest efforts by the bankruptcy court to sell his rural homestead property (Pet. App., 15a). Although this order recites that evidence and argument of counsel and of Petitioner *pro se* were heard, the record reflects that no hearing was held (Pet. App., 18a)

The District Court, in an early ruling on the mootness argument advanced by the Bankruptcy Trustee, Mr. Boudloche, held that Petitioner could not get his property back, regardless of the outcome, but would be able to recover from proceeds of the sale if he should prevail on appeal (Pet. App., 11a)

The final order of the District Court of January 8, 1999, again denied Petitioner's Motion to stay the sale (Pet. App., 6a).

The state of the record is that the entity which has purchased the homestead property, Monterey, Inc., has not yet exercised its option to purchase (Pet. App., 2a; 11a).

REASONS FOR GRANTING THE PETITION

There has been an extensive amount of controversy over the types of exemptions available in bankruptcy, the amount of the exemption being inversely proportional to the amount of the bankruptcy estate left for administrative expenses and creditors. Thus, there must be uniformity in these decisions so that the rule of law will prevail over emotion, especially when the most important and most valuable possession of a state's citizen is at stake, his home.

ARGUMENT TO SUPPORT GRANTING THE PETITION

As the *en banc* Fifth Circuit stated in *Davis v. Davis*, 170 F.3d 475, (5th Cir. 1999 *en banc*) cert. dismissed, U.S. Lexis 5068, 120 S.Ct. 67 (U.S. 1999) :

> ". . Exemptions have been perennially controversial, because they reduce assets potentially available to pay creditors and arouse charges of abuse of bankruptcy. Exemptions are also fought over by states'-rights advocates, who value the traditional state legislative prerogative to adjust exemptions to local

> economic conditions, and by advocates of federal uniformity, who want to raise -- or lower -- exemptions based on conceptions of national equity. Congress allayed the controversy between state and federal advocates by providing in the 1978 Bankruptcy Code that states could opt out of prescribed federal exemptions altogether or could allow their citizens to select either schedule. See *11 U.S.C. § 522*(b). 170 F.2d 475, 478

There have been numerous congressional hearings over which one side of the issue describes as "bankruptcy reform" and the other side as "the prerogative of the states". See Congressional Record, p. S 11563, September 21, 1999. The prevailing view is that expressed by a bi-partisan delegation of Texas congressmen which caused a letter from Texas governor George W. Bush to be included in the Congressional Record as being strongly opposed to limiting the homestead exemption. The relevant portion of Governor Bush's letter reads as follows:

> "...The Texas homestead provisions, included in the Texas Constitution, exempt a Texas resident's homestead in the event of a declared bankruptcy and place no monetary restrictions on that property. The Texas law does provide certain restrictions, such as limiting homestead property to one acre in urban area and 200 acres per family in a rural area. By placing a monetary cap of $100,000 on the amount of equity individuals can protect from foreclosure, the amendment to both bankruptcy reform bills would preempt the Texas Constitution..." Congressional Record, p. H 4350, June 10, 1998

However, in spite of many congressional hearings over amendments of the bankruptcy laws, the exemption statutes

available to debtors under 11 U.S.C. § 522 (b) seem to be solidly based under the bankruptcy code as the "prerogative of the states". Perhaps the reason for the continued codification of homestead rights is the consideration of each states' interest in preserving the right of shelter for its citizens.

The Texas Constitution enjoys such a hallowed position in the Fifth Circuit that this Court of Appeals is required to independently analyze a claim of homestead under the Texas Constitution. See *In the Matter of Bradley,* 960 F.2d 502, 507 (5th Cir.; 1992). The importance of homestead rights in Texas is illustrated by the early Texas case of *Franklin v. Coffee*, 19 Tex. 413 (1857), 1857 WL 4980 (Tex) referred to extensively by the Fifth Circuit in the *Bradley* case as follows:

> ". . Even before the ink had dried on the joint resolution of Congress that admitted Texas as the twenty-eighth state in the Union, Texas citizens enjoyed broad homestead rights. See Tex. Const. art. VII, § 22 (1845). Not much has changed in the last 145 or so years. As it did in the dawning days of the state, the homestead exemption in Texas continues to "protect citizens and their families from the miseries and dangers of destitution." *Franklin v. Coffee*, 18 Tex. 413, 415-16 (1857) . . ."

Thus, the Texas Supreme Court in *Franklin*, infra, of great relevance to this case stated that a rural homestead may "be a mere cabin or tent, open to the winds and rains of heaven".

The Lower Courts Have Misconstrued a Federal Statute

The panel opinion in this case supports its decision, denying Petitioner a remedy under 11 U.S.C. § 363(m) by a pure error of law, thereby expanding the scope of a harsh remedy when there is no support for their holding in the express terms of the statute. It is pointed out to this Court that

§ 363(m) only pertains to the appeal of bankruptcy court authorized sales under 11 U.S.C. § 363(b) or (c), both of which authorize the bankruptcy court to sell only property of the bankruptcy estate.

What constitutes "property of the bankruptcy estate" is set forth in 11 U.S.C. § 541, and by its wording, seems to be all-encompassing. However, as Petitioner has urged upon the lower courts, sections of the Bankruptcy Code should be read in harmony so that the Congressional intent will be fulfilled. This Court has held that a statute must be enforced according to its terms. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026 (1989). Thus, the exemption statute under which Petitioner elected to claim his state exemptions under the Texas Constitution, states in 11 U.S.C. § 522 subsection (b) in relevant part:

> ". . (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate listed in either paragraph (1) or paragraph (2) of the subsection. . ."

The cases relied upon by the Fifth Circuit in this case (Pet. App., 4a-5a) do not involve Texas homestead rights or any other comparable homestead rights under state law where a debtor has elected to claim his homestead under state law, especially not under an established State Constitutional provision as Petitioner did in this case. Rather the cases relied upon by the Fifth Circuit in its §363(m) rationale for denying Petitioner any remedy all involved "property of the bankruptcy estate".

Thus, the 363(m) cases relied upon by the Fifth Circuit were *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3d Cir. 1990) (a shopping center lease); *American Grain Ass'n v. Lee-Vac Ltd.*, 630 F.2d 245 (5th Cir. 1980) (debtor-lessee, owner of grain elevator, obtained a bankruptcy court order that lessor could not

unreasonably withhold consent to the assignment of the lease involved in the sale by the debtor); and *In re Combined Metals Reduction Co*, 557 F.2d 179 (9th Cir. 1977)(challenge of corporation's plan of reorganization by minority stockholder and creditor).

However, the Fifth Circuit has held that exempt property cannot be property of the estate. See *Hardage v. Herring Nat. Bank*, 837 F.2d 1319, 1322 (5th Cir. 1998).

Refusal to Exercise Discretion Denies Petitioner Due Process

Petitioner has succinctly pointed out to this Court that the issues in this case far exceed the narrow limits of § 363(m). Thus, there could be no basis for the Fifth's Circuit holding which states:

> ". . Under § 363(m), we do not have to (sic) power to grant the only remedy sought by Tucker—stay of the sale of the I-27(sic) Property..." (Pet. App., 5a)

Although the issues in *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997), involving constitutional issues pertaining to the Establishment Clause, are certainly different than the instant case, the rationale of *Agostini* certainly applies to Petitioner's attempt to obtain a stay when the lower courts misinterpret the law and believe that they have no power to grant the stay. This Court in *Agostini*, of relevance to the instant case stated:

> ". . it is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained..." 521 U.S. 203, 238, 117 S.Ct. 1997, 2018

Certainly the fact that the lower courts were under the mistaken impression that they had no discretion, that, as the

Fifth Circuit stated in this case, *infra*, that they had no power to grant the stay requested by Petitioner, certainly is a compelling reason for this Court to grant the writ, taking into consideration the necessity of uniformity in the bankruptcy laws.

Necessity of Uniformity in Bankruptcy Exemption Law

As Petitioner has stated, sections of the Bankruptcy Code cannot be read in isolation as the lower courts have done. Certainly a very key issue in the administration of a bankruptcy estate is what property of the debtor constitutes "property of the bankruptcy estate". Thus, in *Patterson v. Shumate*, 504 U.S. 753, (1992), this Court held that national policy required its uniform construction of the term "non bankruptcy law" in 11 USC § 541(c)(2), to include state law and federal law in determining whether a restriction of transfer allowed a debtor to exclude his interest in an ERISA-qualified pension plan. The holding of *Patterson* satisfied this Court's concern of the important policy of the uniform national treatment of ERISA pension benefits. Certainly this concern was reinforced by not allowing these benefits to become part of the bankruptcy estate. 504 U.S. 753, 765

It has been held that a homeless person has standing to assert a due process deprivation under the Fourteenth Amendment of the United States Constitution where the place he has been sleeping as a homeless person was destroyed. *Stone v. Agnos*, 960 F.2d 893 (9th Cir. 1992).

CONCLUSION

The denial of the stay requested by Petitioner might well render him homeless if no discretion is exercised to stay the sale of his homestead if he prevails on his Homestead Appeal. This Court has long recognized, even before *Globe Newspaper Co v. Walker,* 210 U.S. 356 (1908) that:

". . the law confers no right without a remedy to secure it is a maxim of the law . . . 210 U.S. 356, 358

Very recently this same equitable maxim has come before a divided Court in *Kimel v. Fla. Board of Regents*, 528 U.S. ____(2000) where Justice Souter in his dissent concerning whether or not this Court had the power to superimpose this equitable maxim over the Eleventh Amendment, stated the following:

> ". . . if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's "Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. . ." 528 U.S. __@ p. 6 of Justice Souter's dissenting opinion.

This Court stated in *Stainback v. Mo*, 336 U.S. 369 (1949) that:

> ". . . Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected..." 336 U.S. 369, 383

There is thus ample authority for Petitioner's writ. Petitioner has no other remedy unless this Court grants this writ.

For these reasons, Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

April 3, 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 99-40208
USDC No. 98-CV-299

(Summary Calendar)

DANIS TUCKER,

Appellant,

versus

FIRST COMMERCIAL BANK NA; MONTERREY, INC; and MICHAEL DAVID BOUDLOCHE,

Appellees.

FILED
JAN 04 2000
CHARLES R. FULBRUGE III CLERK

Appeal from the United States District Court
For the Southern District of Texas

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Danis Tucker ("Tucker") appeals the district court's dismissal of his appeal from a bankruptcy court order approving the sale of real property that he claims is exempt from the bankruptcy estate. We affirm.

During Chapter 7 bankruptcy proceedings, debtor Tucker claimed a spice packaging plant located at Interstate Highway 37 (the "I-37 Property") as exempt homestead property pursuant to 11 U.S.C. § 522(b). The bankruptcy court denied Tucker's homestead claim, and that claim is currently on appeal in this court (the "Homestead Appeal").

The present appeal arises out of the disposition of the 1-37 Property as an asset of Tucker's estate. Chapter 7 Trustee Michael David Boudloche ("Boudloche") obtained the approval of the bankruptcy court (the "bankruptcy court order") to enter into a contract granting Monterrey, Inc. ("Monterrey") the right to lease the I-37 Property with an option to purchase. After the contract was executed, Monterrey began paying Boudloche (as trustee) monthly rent on the I-37 Property. Monterrey has not yet exercised its purchase option.

Tucker's subsequent motion to reconsider the bankruptcy court order was denied by the bankruptcy court. When Tucker appealed the denial to the district court, Boudloche moved to dismiss the appeal as moot. The district court[1]—after

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] This case was initially before Judge Jack, who denied the motion to dismiss, finding that Tucker's appeal was not moot because the court could still adjudicate the disposition of the proceeds of the sale of the I-37 Property. The case was then transferred to Judge Head for oral argument. Judge Head dismissed the case as moot.

discerning at oral argument that the only remedy sought by Tucker was stay of a sale of the I-37 Property—dismissed the appeal as moot under § 363(m) of the Bankruptcy Code.

On appeal, Tucker contends that the district court erred in finding that his appeal was moot under § 363(m), and he requests that the sale of the I-37 Property be stayed pending a final determination in the Homestead Appeal. He also requests that the instant action be consolidated with the Homestead Appeal. We review the district court's factual findings for clear error. *See In re GGM,* 165 F.3d 1026, 1029 (5th Cir. 1999). The district court's legal conclusions are reviewed *de novo. See id.*

An appeal is properly dismissed as moot when an appellate court lacks the power to provide an effective remedy for an appellant even if the court were to find the appellant's favor on the merits. *See In re Sullivan Century Plaza, I, Ltd.,* 914 F.2d 731, 735 (5th Cir. 1990). Section 363 (m) of the Bankruptcy Code moots a bankruptcy appeal by removing the remedy when a sale authorized under § 363(b) or (c) has been made to a good faith purchaser. *See id.,* 914 F.2d at 734 n.9. Section 363(m) provides that:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Under this section, if a debtor fails to obtain a stay pending appeal, an appellate court cannot affect the validity of a sale to good faith purchasers, but it can affect the distribution of the proceeds from that sale where those proceeds have not yet been distributed. *See BMG Music v.*

Martinez, 74 F.3d 87, 89 n.3 (5th Cir. 1996) (finding that an appeal was not moot where a court's ruling affected the distribution of proceeds from a sale, but not the title held by bona fide purchasers of the sold property).

The issue before us is whether an option to purchase is considered a "sale or lease" under § 363(m).[2] Tucker argues that we should strictly construe § 363(m) as applying only to narrowly defined "sales" or "leases" and not to options. Boudloche contends that § 363(m) applies to the present lease with purchase option. He argues that under § 363(m), Tucker's failure to stay the present authorization renders his appeal moot under the Bankruptcy Code.

Section 363(m) reflects a policy favoring finality of judgments approving sales in bankruptcy involving good-faith purchasers. *See In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1095 (3d Cir. 1990) ("The finality and reliability of the judicial sales enhance the value of the assets sold in bankruptcy.") (citation omitted). In *American Grain Ass'n v. Lee-Vac Ltd.*, 630 F.2d 245 (5th Cir., Unit A 1980), we recognized that "this policy concern is implicated not only when property is sold to a third party, but also when a lease or option is granted to a third party in reliance on an order of the bankruptcy court." *See id.* at 248. Accordingly, we held that "in the absence of a stay of a bankruptcy court's order affecting a debtor's property, a party appealing the order will not be heard to affect the rights of a

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[2] In the Statement of Issues section of his brief, Tucker purports to raise the question of "[w]hether the lower courts erred in approving the sale of the I-37 property by virtue of a lease with an option to purchase when Appellant has perfected his appeal of the lower court orders denying his claim that this property was his rural homestead." Tucker did not raise this issue before the district court. Furthermore, Tucker fails to develop this argument in the body of his brief, and we therefore consider the argument abandoned. *See Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996).

third party who, pursuant to the order, acquired, in good faith, an option or lease on the property." *American Grain Ass'n,* 630 F.2d at 248, *quoted in In re Slocum,* 922 F.2d at 1095; *see also In re Combined Metals Reduction Co.,* 557 F.2d 179 (9th Cir. 1977) (finding, under general principles of bankruptcy law, that appeal from order confirming leases and options was moot where order of bankruptcy court had not been stayed pending appeal).

The same principles apply to the instant case. Here, Tucker was unable to obtain a stay of the option sale of the I-37 Property pending appeal from either the bankruptcy court or the district court. In the interim, good faith purchaser Monterrey paid consideration to lease the I-37 and to acquire an option to purchase. Under § 363(m), we do not have to power to grant the only remedy sought by Tucker—stay of the sale of the I-27 Property. Such a stay would clearly "affect the rights of" third party Monterrey. Accordingly, the appeal is moot.

For the reasons stated above, the judgment of the district court is AFFIRMED. We DENY, as moot, Tucker's motion to consolidate this appeal with the Homestead Appeal.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

DANIS R. TUCKER	§	
	§	
V.	§	C.A. NO. C-98-299
	§	
FIRST COMMERCIAL	§	
BANK, ET AL.	§	

ENTERED JAN 12 1999
Michael N. Milby
Clerk of Court

ORDER DISMISSING APPEAL

The Appellant appeals an order of the bankruptcy court approving the sale of certain real property that he claims is exempt from the bankruptcy estate. In a previous order (DE 10), this Court held that possession and title of the real property has been transferred to a third party in good faith, and that the transfer is final. The Court declined to dismiss the appeal as moot, because the Court still could grant meaningful relief concerning the distribution of the sale proceeds. At the oral argument held January 8, 1999, the appellant announced that the only relief sought by this appeal is a stay of the sale of the real property pending resolution of an appeal of another case challenging the bankruptcy court's decision that the property was nonexempt. Because the Court cannot grant the relief sought by the appellant for the reasons stated in the Court's previous order, this appeal is dismissed as moot.

ORDERED this 8th day of January, 1999.

/s/ H.W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
DANIS TUCKER,	§	
d/b/a RALPH'S FOODS CO.,	§	
Debtor,	§	
	§	CIVIL ACTION
	§	NO. C-98-299

ENTERED AUG 18 1999
Michael N. Milby
Clerk of Court

ORDER DENYING TRUSTEE'S MOTION TO DISMISS APPEAL

On this day came on to be considered the Trustee's motion to dismiss the above-styled appeal from the Bankruptcy Court. For the reasons stated herein, the Court DENIES said motion.

I. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 158 (a).

II. FACTS AND PROCEEDINGS

On April 1, 1998, the Bankruptcy Court granted the Trustee's motion for lease and sale of Debtor's real property to Monterrey, Inc. Debtor timely filed a motion to reconsider this order approving the sale. In April, Monterrey signed a lease to the property which includes an exclusive option to purchase clause, and the Trustee delivered possession and title of the

property to Monterrey. Monterrey pays the Trustee monthly rent on the property.

On May 6, the Bankruptcy Court denied Debtor's motion to reconsider. Within ten working days, Debtor filed notice of appeal to this Court of the order denying his motion to reconsider the order of lease and sale.

Now, the Trustee moves to dismiss the appeal on two grounds: untimeliness and mootness. First, the Trustee contends that Debtor's notice is untimely since it was filed more than ten days after the April 1 order which approved the lease and sale. Second, the Trustee proposes that the appeal is moot since 11 U.S.C. § 363(m) prohibits the modification of the lease and sale of the real property to Monterrey.

III. DISCUSSION

A. Timeliness of Appeal

Bankruptcy Rule 8002(a) requires that a notice of appeal be filed within 30 days of the date of the entry of the order appealed from. Fed.R.Bankr.P. 8002(a). However, when a party files a motion to reconsider pursuant to Rule 9024, that 10 day period does not begin to run until the motion to reconsider is disposed of by the bankruptcy court. Fed.R.Bankr.P. 8002(b).

Here, Debtor filed his notice of appeal within 10 days of the Bankruptcy Court's disposal of his motion for reconsideration. Accordingly, this Court FINDS that Debtor's notice is timely.

B. Mootness of Appeal

In *Matter of Sullivan Century Plaza I. Ltd.*, 914 F.2d 731 (5th Cir. 1990), the Firth Circuit discussed the nature and effect of the mootness doctrine in circumstances where property in bankruptcy proceedings has already been sold to good faith purchasers. The mootness doctrine is "premised on the

fundamental jurisdictional tenet that federal courts are empowered to hear only live cases and controversies." *Id.* at 735 (citing U.S. Const. art. III, section 2). An appeal is properly dismissed as moot when an appellate court lacks the power to provide an effective remedy for an appellant should it find in the appellant's favor on the merits. *Id.*

Section 363(m) of the Bankruptcy Code generally moots a bankruptcy appeal by removing the remedy when a sale authorized under § 363(b) or (c) has been made to a good faith purchaser:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Accordingly, an appellate court cannot affect the validity of the sale of the estate's property to the good faith purchasers, but the court can affect the distribution of the proceeds from the sale where those proceeds have not yet been distributed. *BMG Music v. Martinez,* 74 F.3d 87, 89 n. 3 (5th Cir. 1996) (stating that the case was not moot where "this Court's ruling affects the ownership of those proceeds [from the sale] but not the title held by the bona fide purchasers of that property"). In short, if the proceeds have not been distributed, then the case is not moot as to ownership of the proceeds.

Here, the Trustee has submitted an affidavit which indicates that possession and title of the Debtor's real property have been transferred to Monterrey in good faith and that the transfer is final. Thus, it appears that § 363(m) will preclude the

return of the real property to Debtor, even if the Debtor prevails in his appeal. However, since—as the Trustee's affidavit indicates—Monterrey is leasing the property and paying monthly rent, the proceeds from the transfer have not all been distributed to creditors. Accordingly, it appears that there are proceeds which could the Debtor could still receive if he were to prevail in the appeal; therefore, the Court FINDS that the appeal is not moot.

IV. CONCLUSION

For the foregoing reasons, the Court FINDS that the notice of appeal was timely filed and that the appeal is not moot. The Court DENIES the Trustee's motion to dismiss.

ENTERED on this the 14th day of August, 1998.

/s/ Janis Graham Jack

JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
DANIS R. TUCKER D/B/A	§	CASE NO.
RALPH'S FOODS CO.	§	94-21485-C-7
Debtor	§	

ENTERED APR 01 1998
Michael N. Milby
Clerk of Court

AGREED ORDER GRANTING TRUSTEE'S MOTION FOR LEASE AND SALE OF REAL PROPERTY

Came on to be heard the Expedited Motion for Lease and Sale of Real Property by Michael Boudloche, Trustee, and having heard the evidence and argument of counsel is of the opinion that such Motion should be GRANTED, the Court is of the opinion and finds that the relief requested is necessary and proper, is in the best interest of the estate and the creditors and that Monterey, Inc. is leasing and purchasing the property of this estate in good faith at a fair and reasonable price. Therefore,

IT IS ORDERED that the Agreement attached to the Trustee's Expedited Motion for Lease and Sale (the "Agreement") is APPROVED and Mike Boudloche, Trustee, is authorized to consummate the Agreement, with the following additional provisions:

A. Trustee shall pay to the Bank/SBA the amount of $5500 per month as a form of "adequate protection" toward their

first lien. These payments shall begin with the second (2nd) full calendar month of the lease term and in the event of an increase in the amount of rental paid, Bank/SBA shall receive 62% of any rental increase. The remaining amount of each rental payment received shall be applied to any expense(s) of the Trustee that the Court may order is/are entitled to a superior position to the liens held by Bank/SBA, or that the Court may order to be paid to the Trustee before Bank/SBA;

B. The Motion to Lift Stay of the Bank/SBA shall be and is hereby dismissed without prejudice;

C. Trustee's real estate broker, Armando Avalos, shall receive 4% of the gross rental per month and 4% of the gross sales price from the lease and/or sale of the I-37 Plant;

d. Trustee is authorized to make reasonable and necessary repairs, maintenance and "clean-up" to enable lessee to move-in. These costs and expenses shall be allowed in an amount not to exceed the rent received through the first full calendar month of the lease term and such rent received shall be applied to such costs and expenses;

e. The sale to Monterey, Inc. pursuant to their election to exercise their option to purchase under the terms of the Agreement is approved and the Trustee is authorized to sell the I-37 Plant to Monterey, Inc. pursuant to the Agreement without further consent or Order of this Court; and,

f. The Lease and sale to Monterey, Inc. is authorized pursuant to 11 U.S.C. Sec. 363 and shall be free and clear of all claims and liens, all such claims and liens to attach to the proceeds, to the extent they are valid.

g. Trustee's Motion for expenses under 11 U.S.C. § 506(c) shall remain under advisement, to be decided and ruled upon at this Court's earliest convenience.

SIGNED this 30 day of March, 1998.

/s/ Richard S. Schmidt

Richard S. Schmidt
United States Bankruptcy Judge

AGREED:

/s/ Douglas Bircher

Douglas Bircher
Attorney for Bank/SBA

/s/ Michael B. Schmidt

Michael B. Schmidt
Attorney for Trustee

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
	§	
DANIS TUCKER	§	Case No. 94-21485-C-7
	§	
DEBTOR	§	

ENTERED MAY 12 1997
Michael N. Milby
Clerk of Court

ORDER DENYING EMERGENCY MOTION FOR STAY PENDING APPEAL AND EMERGENCY AMENDED MOTION FOR STAY PENDING APPEAL ON ORDER SUSTAINING OBJECTION TO EXEMPTIONS

On this day came on for consideration the Emergency Motion for Stay Pending Appeal and the Emergency Amended Motion for Stay Pending Appeal on Order Sustaining Objection to Exemptions filed by Danis Tucker. The Court, having heard the evidence and arguments of counsel and of the Debtor, *pro se*, and having carefully reviewed the Motions to Stay finds that the Motions should be denied.

It is therefore ORDERED that the Emergency Motion for Stay Pending Appeal and the Emergency Amended Motion for Stay Pending Appeal on Order Sustaining Objection to Exemptions are hereby DENIED.

Dated this 20th day of May, 1997.

/s/ Richard S. Schmidt

RICHARD S. SCHMIDT
United States Bankruptcy Judge

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk of Court
By /s/ Jeanie [illegible]
Deputy Clerk

APPENDIX F

UNITED STATES BANKRUPTCY COURT
COURTROOM MINUTES

(x) HEARING
( ) DOCKET CALL

May 19, 1997, 9:00 A.M.

JUDGE: RICHARD S, SCHMIDT

LOCATION: United States Bankruptcy Court, 615 Leopard Street, Corpus Christi, Texas

BANKRUPTCY CASE NUMBER 94-21485-C-7

DEBTOR: DANIS TUCKER

dba RALPH'S FOODS CO,

MOVANT:

APPEARANCES: ( ) ***NO APPEARANCES***

Attorney for Debtor/DIP: Pro se

Trustee:_____ Attorney:: Mike Schmidt
Dean Greer for Helen Tucker
J.W. Wray for M.A. Garay
( ) Additional appearances noted on reverse side of page

DOCUMENT # NATURE OF PROCEEDINGS:

(#695) DEBTOR'S MOTION FOR STAY PENDING APPEAL ON MEMORANDUM OPINION AND ORDER SUSTAINING OBJECTION TO HOMESTEAD EXEMPTION TO DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

_____ ( ) Other: _____

DISPOSITION:

( ) No Appearances/No action taken

( ) Order/Agreed Order submitted/to be submitted

by _____ by/within (date) _____

( ) Motion **GRANTED/DENIED/___ WITHDRAWN__**

( ) Disclosure Statement approved

( ) Plan confirmed/Confirmation denied

( ) Passed to final hearing on _____

( ) Hearing commenced/concluded

( ) Hearing continued to _____

(x) This matter was not heard.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

99-40208

DANIS TUCKER, APPELLANT

V.

FIRST COMMERCIAL BANK, N.A., Et. Al.,
APPELLEES

MOTION OF APPELLANT DANIS R. TUCKER TO CONSOLIDATE THIS APPEAL WITH THE APPEAL IN CAUSE NO. 97-41385

TO THE HONORABLE COURT OF APPEALS:

COMES NOW DANIS TUCKER, Appellant, and files his Motion to Consolidate this Appeal with Cause No. 97-41385. As grounds therefore, Appellant would show the Court the following:

1. This appeal has common questions of law and of fact with the homestead issues involved in Cause No. 97-41385, currently pending before this Court. At issue in the instant appeal is an order awarding to Appellee Monterey, Inc., an option to purchase the property claimed by Appellant as his rural homestead.

2. One of the main issues in the instant appeal is the validity of the orders of the lower courts denying Appellant's Motion to stay the order granting Monterey, Inc. the option to

purchase the rural homestead property pending this appeal. The most recent order denying Appellant's Motion to stay emanated from a hearing before the District Court on January 8, 1999.

3. The District Court has held that this matter is not moot.

4. Appellant has raised serious questions concerning the validity of the decision of the lower court in denying his rural homestead rights in District Court No. 97-299, which issues for review are included in Cause No. 97-41385.

5. The consolidation issue, sought by this motion, is separate and distinct from the mootness issue in this appeal. Appellant seeks consolidation by motion pursuant to the suggestion of Appellee Boudloche in his Brief in this cause. Thus, on page 15 of his brief in the instant appeal, Appellee Boudloche states in part the following:

> "...Consolidation under Fed. R. App. P. 3(b) should be sought by motion prior to briefing, rather than by an "issue on appeal." *See generally, Harris v. City of Houston,* 151 F.3d 186, 188 (5th Cir. 1988)..."

6. The briefing has not been concluded in this cause, Appellant's Reply Brief being due on September 17, 1999. The briefing has not been concluded in Cause No. 97-41385 as Appellant's Reply Brief is due on September 21, 1999.

7. Thus, this appeal has a common questions of law and fact (based upon the clearly erroneous standard of review) with Cause No. 97-41385, namely were the lower courts correct in denying Appellant's rural homestead exemption claim? If Appellant prevails on his homestead claim, then it would be a miscarriage of justice to allow his property to be swept out from under him when there has been no disposition of the property at the time of this motion. By way of consolidation,

Appellant does not seek any additional right nor does he obtain any advantage over any party to these appeals.

8. The consolidation of the instant cause would not cause any delay. In fact, it is probable that the consolidation sought would accelerate the disposition of all of these appeals.

9. The granting of this consolidation could not result in harm to any party not before this court, which is the usual situation in an matter involving the validity of an order in the bankruptcy court pursuant to 11 U.S.C. § 363(m). Appellee Monterey, Inc. has elected not even to file a brief in opposition. See Exhibit "A", attached hereto.

10. This motion is opposed.

MEMORANDUM IN SUPPORT OF MOTION

Appellee Boudloche has two short paragraphs in his brief in opposition to consolidation. He suggests that *Harris v. City of Houston,* 151 F.3d 186, 188 (5th Cir. 1998) gives this Court some guidance on the consolidation issue. This is not so. In fact, the only reference to consolidation was to an "unopposed motion", which was granted. 151 F.3d 186, 188. The undersigned has been unable to locate any precedent concerning the criteria for consolidation where the motion for same is contested, as in this case. The main guidance for the requested consolidation is Fed.R.App.P. 3(b). Of relevance is the comment of the Rules Advisory Committee that consolidation of appeals is encouraged "whenever feasible". *Advisory Committee Notes to 1967 Adoption, Westlaw, Fed. R. App.P.,* at page 8.

This Court is reminded that the District Court held that this appeal was not moot and fashioned a remedy which puts this issue squarely before this Court as follows:

> "...but the court can affect the distribution of the proceeds from the sale where those proceeds have not yet been distributed. *BMG Music v. Martinez,* 74 F.3d 87, 89 n. 3 (5th Cir. 1996) (stating that the case was not moot where "this Court's ruling affects the ownership of these proceeds [from the sale] but not the title held by the bona fide purchasers of that property"). In short, if the proceeds has not been distributed, then the case is not moot as to ownership of the proceeds..." Record Excerpt No.***

In the *BMG Music* case the property has already been sold. That is not the situation in this case. The option to purchase has not been exercised. In the instant case, as can be seen by the remarks of the Appellee Monterey, Inc., they have much less at stake than Appellant. Appellant has notified Monterey, Inc. since it exercised its option that it was contesting the order awarding this (See Appellant's Record Excerpt No. 2, Docket Entry # 695, dated 3/14/97), over a year before the option contract was entered into (Appellant's Record Excerpt # 3). However, the exercise of the option has not occurred (Appellee's Brief, p. 11). Appellant has not waived any issue as he has sought stays; the propriety of the denial of the stays sought are now before this Court. As has been pointed out in his Brief in the instant appeal, the rationale of 11 U.S.C. § 363(m) is not being thwarted by consolidation in this case as there is no effect on parties not before this Court. *Berryman Products,* 159 F.3d 942 (5th Cir. 1998). Appellee's speculation that this matter could effect Monterey, Inc's terminable at will employees should be disregarded as a weak attempt to try and get this case into the chapter 11 substantial consummation exception prong of mootness. This is not a chapter 11 case.

This Court has reemphasized the importance of Texas homestead law in *In the Matter of Bradley,* 960 F.2d 502 (5th

Cir. 1992), wherein it was held that the *de novo* standard requires an independent analysis of Texas homestead law.

Appellee Boudloche, in his brief, confuses mootness with consolidation. However, this matter is not moot. The option has not been exercised. Appellant could prevail in his homestead appeal, and if the propriety of the stay is not reached, he could still lose his homestead. This Court should not allow that to happen. A direct analogy can be drawn from *Garza v. Westergren,* 908 F.2d 27 (5th Cir. 1990), when occurrence which the appellants complained of had already occurred, unlike the instant case. Thus, in *Garza v. Westergren* the holding which required consolidation in this case reads as follows:

> "...The only issue decided by the district court was to deny the injunction to stay the contempt proceeding; therefore, that is the sole issue for appeal. Because the contempt proceeding has occurred, this appeal is not moot..." 908 F.2d 27, 28

It has been held that the legislative policy behind 11 U.S.C. § 363(m) was to encourage optimum bids for "property of the estate" from entities not otherwise privy to the bankruptcy proceedings. See *In Re Healthco International, Inc. v. Brandt,* 136 F.3d 45, ____ (1st Cir. 1998).

Monterey, Inc. apparently has no intention of exercising the option in question, or it would have done so. The occurrence alleged by Appellee Boudloche as denying consolidation has not occurred. In the above cited *Garza* case, Judge Westergren had already held the contempt hearing; therefore the issue was moot.

It has been held that when a federal decision deprives a person of a state right, the person so deprived has standing as an Intervenor. *United States v. State of Texas,* 158 F.3d 299,

303-304 (5th Cir. 1998). Appellant claims that he has been deprived of a state constitutional right which this Court is required to independently analyze. *In the Matter of Bradley,* 960 F.2d 502, 507 (5th Cir.; 1992), a right which has been early recognized by the Texas Supreme Court at least as early as 1857 in *Franklin v. Coffee,* 18 Tex. 417 (1857). As the Texas Supreme Court early in Texas jurisprudence held, a rural homestead may "be a mere cabin or tent, open to the winds and rains of heaven." *See In re Mitchell,* 132 B.R. 553, 560 The court also said that it could be a "splendid mansion."

It will undoubtedly be asked by Appellee, what does this have to do with consolidation? It simplifies the issues for the court and the parties. It encourages a speedy resolution of the issues. Since Monterey, Inc. has not exercised the option after almost 18 months (since April 1, 1998; Appellant's Excerpt # 3), and Appellant has attempted several stays, and has the validity of the denial of a stay order (of the order granting the option in question) before this Court, this matter should be resolved with the main issue, so the parties will know where they stand. If there is no consolidation, then Appellant is more likely, because of lapse of time, lose a valuable right even if he prevails on the homestead exemption issue. As the Rules Advisory Committee states, consolidation of appeals is encouraged "whenever feasible." Consolidation will help prevent the loss of a valuable, state constitutional right by placing all of the issues before this Court. This is what the District Court intended when he stated he relevant part on January 8, 1999:

> "...I'm going to give you a judgment so that this case can go forward and be consolidated..." (Appellant's Record Excerpt #15, p. 45, 1. 12)

In conclusion, consolidation of these cases can only enhance the administration of justice and promote efficiency by hearing common questions at one time.

WHEREFORE, Appellant Danis Tucker prays that the Court grant his Motion to Consolidate the instant appeal with the appeal in Cause No. 97-41385. Further, Appellant prays for such other and further relief to which he may be entitled.

Respectfully submitted,

/s/ Sam A. Westergren

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